IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

THURSDAY, THE 15TH MARCH 2007 / 24TH PHALGUNA 1928

CRL.A.No. 560 of 2005(B)

AGAINST THE JUDGEMENT/ORDER IN CRLP.835/2004 Dated 20/12/2004
ST.5915/2003 of JUDL. MAGISTRATE OF FIRST CLASS COURT-I, THRISSUR

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APPELLANT/COMPLAINANT

M/S. KAIRALI ASSOCIATES,
KAK BUILDINGS,RICE BAZAAR,
THRISSUR, REPRESENTED BY ITS MANAGING PARTNER
T.A.VARGHESE.

BY ADV. SRI.K.A.SHAMSUDEEN

RESPONDENTS/ACCUSED/STATE

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1. P.A.JACOB, S/O. ANTHAPPAN,
AGED 45, PARAPPULLY HOUSE, PEROOR DESOM,
VILVATTOM VILLAGE, THRISSUR

2. BABY W/O. JACOB, AGED 38
PARAPPULLY HOUSE, PEROOR DESOM,
VILVATTOM VILLAGE, THRISSUR.

3. STATE OF KERALA REPRESENTED BY
THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY ADV. SRI.M.P.ASHOK KUMAR
PUBLIC PROSECUTOR, SRI.P.RAVEENDRA BABU

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 15/03/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.THANKAPPAN, J.

Crl.A. No. 560 of 2005

Dated this the 15th day of March, 2007

JUDGMENT

This appeal is directed against the order passed in ST No.5915/03 on the file of the Judicial Magistrate First Class Court No.I, Thrissur. The appellant-firm filed the complaint alleging that respondents 1 and 2 have committed an offence punishable under Section 138 of Negotiable Instruments Act, 1881. The case projected in the complaint was that the respondents 1 and 2 have issued a cheque in favour of the appellant-firm for an amount of Rs.1,69,070/- in discharge of a liability cast on the appellant/complainant. It is further stated that when the cheque was presented for encashment, the same was dishonoured on the ground of insufficiency of fund with the account of the account holder. On getting intimation from the Bank regarding the dishonour of the cheque, the appellant-complainant on complying with the statutory provisions of notice, etc., and on finding that the amount covered by the cheque was not paid by the respondents 1 and 2, filed the complaint. The trial Magistrate had taken cognizance of the complaint and issued summons to respondents 1 and 2. Subsequently the case was posted for evidence of the appellant on 9.8.04 and on that day the trial court acquitted the respondents 1 and 2 on the sole ground that the complainant was not present in court either in person or by

pleader.

2. This court heard the counsel appearing on either side and perused the records made available to this court.

3. The impugned order would show that the acquittal is only on the ground of the absence of the appellant. The order challenged would not show that the learned trial Magistrate had complied with the provisions of Code of Criminal Procedure and the dictums laid down respectively by this Court and Apex Court in **Don Bosco v. Partech Computers Ltd (2005 (2) KLT 1003)**, **G.F.S. Chit & Loans (P) Ltd v. Rajesh (2006 (3) KLT 825)** and **Associated Cement Co. Ltd. v. Keshvanand (1998 (1) KLT 179 (SC)).** In the first two Judgments, this Court categorically held that an order under Section 256(1) of the court shall be passed only after applying the judicial mind and the discretion vested on the court shall be exercised judicially. In Associated Cement's case, the Apex Court had held that the Court can pass an order under Section 256(1) only under the following circumstances namely:

> *"First is, if the court thinks that in a situation it is proper to adjourn the hearing then the magistrate shall not acquit the accused. Second is, when the magistrate considers that personal attendance of the complainant is not necessary on that day the magistrate has the power to dispense with his attendance and proceed with the case. When the court notices that the complainant is absent on a particular day the court must consider whether personal attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other reason. If the situation does not justify the case being adjourned the court is free to dismiss the complaint and acquit the accused. But if the presence of the complainant on that day was quite unnecessary then resorting to the step of axing down the complaint may not be a proper exercise of the power envisaged in the section. The discretion must therefore, be exercised judicially and fairly without impairing the cause of administration of criminal justice."*

4. The order impugned only shows that the acquittal is on the ground of absence of the appellant and it is not discernable from the order that the personal attendance of the appellant is essential on that day for the progress of the case.

5. In the above circumstances, the judgment under appeal is set aside and the matter is remanded to the trial court for fresh consideration as per law. The trial court is directed to take back the complaint in file and proceed with the case from the stage just before the order is passed.

The parties shall appear before the court on 28-4-2007.

K.THANKAPPAN, JUDGE

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